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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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13 ALLEN COLEMAN, et al.,
14 Plaintiffs,
15 v.
16 KATHLEEN STERLING, et al.,
17 Defendants.
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CASE No: 09-CV-1594 W (BGS)

**ORDER OVERRULING
DEFENDANTS' OBJECTION TO
MAGISTRATE JUDGE'S
MARCH 24, 2011 DISCOVERY
ORDER [DOCS. 94, 96]**

19
20 AND RELATED CROSS ACTIONS.
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22 Pending before the Court is Defendants' objection to United States Magistrate
23 Judge Bernard G. Skomal's March 24, 2011 discovery order. (Doc. 91.) Judge Skomal
24 granted Plaintiffs' request for the unredacted copies of the investigative reports prepared
25 by Sedgwick, Detert, Moran and Arnold LLP ("SDMA"), and ordered Defendants to
26 produce the copies to Plaintiffs. The reports concern SDMA's investigation of Plaintiffs
27 and former Tri-City Healthcare District ("TCHD") Chief Executive Officer Art
28 Gonzalez.

1 The Court decides the matter on the papers submitted and without oral
2 argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **OVERRULES**
3 Defendants' objection. (Docs. 94, 96.)

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5 **I. BACKGROUND**

6 Plaintiffs are former senior executives of Defendant TCHD. On December 18,
7 2008, TCHD placed Plaintiffs on paid administrative leave to investigate their potential
8 misconduct and poor job performance. TCHD retained law firm SDMA to conduct the
9 investigation and report its findings. Attorney Joseph McFaul of SDMA conducted the
10 investigation. McFaul prepared and provided TCHD with three written investigative
11 reports. A fourth non-attorney report was also provided to TCHD. Based on these
12 reports, TCHD's Board of Directors authorized then-interim Chief Executive Officer,
13 Defendant Larry Anderson, to terminate Plaintiffs. On April 24, 2009, Plaintiffs were
14 terminated.

15 On July 15, 2009, Plaintiffs filed a complaint in San Diego Superior Court, and
16 on July 22, 2009, the lawsuit was removed to this Court. As a part of TCHD's initial
17 disclosures, TCHD produced substantial portions of the investigative reports that it
18 contended contain or discuss factual findings. However, TCHD redacted several
19 sections of these reports. It contended that the redacted materials are protected by
20 attorney-client privilege and the work-product doctrine. TCHD produced 364 pages
21 containing the four reports—292 of which were prepared by McFaul—but redacted
22 pages 157-61, 168, 173-74 and 201. Thereafter, Plaintiffs sought production of the
23 unredacted copies of the investigative reports.

24 On October 29, 2010, the parties filed a joint motion for discovery regarding the
25 investigative reports. On March 24, 2011, Judge Skomal granted Plaintiffs' request for
26 the unredacted copies, and ordered Defendants to produce these copies to Plaintiffs no
27 later than April 1, 2011. Judge Skomal found that the unredacted investigative reports
28 are protected by attorney-client privilege and the work-product doctrine. However, he

1 further found that Defendants waived these protections because: (1) they voluntarily
2 produced and relied on these reports; (2) the disclosed and undisclosed communications
3 concern the same subject matter, McFaul's investigation of Plaintiffs; and (3) fairness
4 dictates that TCHD may not selectively disclose privileged and work-product protected
5 information.

6 Defendants did not comply with the deadline to produce the unredacted copies.
7 Rather, on April 11, 2011, they filed an objection to Judge Skomal's March 24, 2011
8 discovery order. Then, on April 20, 2011, Defendants submitted the unredacted copies
9 of the investigative reports to this Court and requested an *in camera* review. Plaintiffs
10 oppose the objection and the request for an *in camera* review.

11 12 **II. STANDARD OF REVIEW**

13 A party may object to a non-dispositive pretrial order of a magistrate judge within
14 fourteen days after service of the order. See Fed. R. Civ. P. 72(a). The magistrate
15 judge's order will be upheld unless it is "clearly erroneous or contrary to law." Id.; 28
16 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to factual findings and
17 discretionary decisions made in connection with non-dispositive pretrial discovery
18 matters. F.D.I.C. v. Fid. & Deposit Co. of Md., 196 F.R.D. 375, 378 (S.D. Cal. 2000);
19 Joiner v. Hercules, Inc., 169 F.R.D. 695, 697 (S.D. Ga. 1996) (reviewing magistrate
20 judge's order addressing attorney-client issues in discovery for clear error). Review
21 under this standard is "significantly deferential, requiring a definite and firm conviction
22 that a mistake has been committed." Concrete Pipe & Prods. of Cal., Inc. v. Constr.
23 Laborers Pension Tr. of S. Cal., 508 U.S. 602, 623 (1993) (internal quotation marks
24 omitted).

25 On the other hand, the "contrary to law" standard permits independent review
26 of purely legal determinations by a magistrate judge. See, e.g., Haines v. Liggett Group,
27 Inc., 975 F.2d 81, 91 (3d Cir. 1992) ("the phrase 'contrary to law' indicates plenary
28 review as to matters of law."); Gandee v. Glaser, 785 F. Supp. 684, 686 (S.D. Ohio

1 1992), aff'd, 19 F.3d 1432 (6th Cir. 1994) (“Thus, [the district court] must exercise its
2 independent judgment with respect to a magistrate judge’s legal conclusions.”); 12
3 Charles A. Wright, et al., Federal Practice and Procedure § 3069 (2d ed., 2010 update).
4 “A decision is contrary to law if it fails to apply or misapplies relevant statutes, case law,
5 or rules of procedure.” United States v. Cathcart, No. C 07-4762 PJH, 2009 WL
6 1764642, at *2 (N.D. Cal. June 18, 2009).

7 8 **III. DISCUSSION**

9 Subject-matter waiver is governed by Federal Rule of Evidence 502, which applies
10 to disclosures of information covered by attorney-client privilege and work-product
11 protection. Rule 502(a) provides that a waiver resulting from a disclosure of protected
12 information in a federal proceeding extends to undisclosed protected materials “only if:
13 (1) the waiver is intentional; (2) the disclosed and undisclosed communications or
14 information concern the same subject matter; and (3) they ought in fairness to be
15 considered together.” Fed. R. Evid. 502(a). “The idea is to limit subject matter waiver
16 to situations in which the privilege holder seeks to use the disclosed material for
17 advantage in the litigation but to invoke the privilege to deny its adversary access to
18 additional materials that could provide an important context for proper understanding
19 of the privileged materials.” 8 Charles Alan Wright, et al., Federal Practice and
20 Procedure § 2016.2 (3d ed., 2010 update). Thus, subject-matter waiver “is reserved for
21 those unusual situations in which fairness requires a further disclosure of related,
22 protected information, in order to prevent a selective and misleading presentation of
23 evidence to the disadvantage of the adversary.” Fed. R. Evid. 502 advisory committee
24 notes.

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1 It is undisputed that Defendants intentionally disclosed the investigative reports
2 to Plaintiffs during discovery in this case. (*See Defs.’ Objection* 10:12–22 [Doc. 94].)
3 However, Defendants argue that Judge Skomal’s analysis of the subject-matter and
4 fairness prongs in finding that there is a subject-matter waiver for the redacted sections
5 is inadequate. The Court disagrees.

6 Judge Skomal’s finding that Defendants waived their attorney-client privilege and
7 work-product protection is neither clearly erroneous nor contrary to law. The evidence
8 and arguments presented to Judge Skomal in the joint discovery motion support this
9 finding. In the parties’ joint discovery motion, the parties described the investigative
10 reports as “concerning [SDMA’s] investigation of Plaintiffs and former TCHD Chief
11 Executive Officer, Art Gonzalez.” (*Joint Disc. Mot. No. 1* at i:4-6 [Doc. 55].)
12 Defendants echoed this description in their statement of facts. (*See id.* at 1:4-6; *McFaul*
13 *Decl.* ¶ 2 [Doc. 62].) Accordingly, Judge Skomal concluded that the subject matter of
14 the reports is the investigation of Plaintiffs.¹

15 The next question in the subject-matter-waiver analysis is to determine whether
16 the disclosed and undisclosed communications concern the same subject. In the joint
17 discovery motion, Defendants described the redacted sections as “contain[ing] legal
18 advice and analysis sought from SDMA *in connection with the investigation of Plaintiffs’*
19 *misconduct.*” (*Joint Disc. Mot. No. 1* at 2:25-26 (citing *McFaul Decl.* ¶ 3) (emphasis
20 added).) This assertion by Defendants concedes that the redacted sections concern the
21 same subject matter—the investigation of Plaintiffs—as the rest of the investigative
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23 ¹ Defendants attempt to recharacterize the subject of the investigative reports. (*See*
24 *Request for In Camera Review* 1:21-22.) However, an objection to a magistrate judge’s order
25 is an inquiry into whether the order is clearly erroneous or contrary to law. Thus, it is
26 incumbent upon the parties to raise all pertinent issues as well as all arguments, contentions,
27 and statements of position before the magistrate judge. *Singh v. Superintending Sch. Comm.*
28 *of City of Portland*, 593 F. Supp. 1315, 1318 (D. Me. 1984). Otherwise, the district court will
not consider the matters not presented to the magistrate judge. *See id.* Here, Defendants
failed to argue or even mention its current characterization of the reports’ subject to Judge
Skomal. Accordingly, the Court will not consider this argument.

1 reports. Furthermore, the *in camera* review also supports this finding. The redacted
2 sections of the investigative reports include, for example, investigation into employment
3 status, the law regarding termination, and findings that cause exists for terminating
4 certain employees. These subjects all concern the investigation of Plaintiffs. Thus, the
5 evidence and arguments presented support Judge Skomal's finding that the redacted
6 sections of the investigative reports concern the same subject as the portions of the
7 reports already produced.

8 The final question is whether the disclosed and undisclosed communications
9 should be considered together in fairness. The contents of the redacted reports already
10 produced include, among other things, an investigation of employee performance, a
11 review of the employment contracts, and legal analysis. For example, on page 161 of the
12 reports, there is a subsection titled "A. Dr. Art Gonzalez." (*Joint Disc. Mot. No. 1, App.*
13 *Vol. 2, Part 2* at 56 [Doc. 55-2].) This section discusses various duties allegedly
14 breached by Dr. Gonzalez—which is legal analysis based on McFaul's investigation—but
15 a portion of text preceding the subsection on the same page was redacted potentially
16 depriving Plaintiffs of important context. The *in camera* review shows that the
17 preceding redacted sections discuss investigative findings that cause exists for
18 terminating certain employees as well as a review of the employment contracts and
19 standards for termination. Hence, these redacted sections that contain factual findings
20 and legal analysis would provide important context for a proper understanding of the
21 protected materials. Furthermore, several of Defendants' affirmative defenses heavily
22 relate to or rely on the contents in the redacted sections. (*See Answer 14:6–28* [Doc.
23 54].) For example, Defendants raise "at-will" employment, good case, failure to perform
24 essential job function, and mistake of contract, among others, as affirmative defenses
25 (*id.*), which are subjects discussed in the redacted sections. Denying Plaintiffs access to
26 the redacted sections would advantage Defendants by allowing them to use attorney-
27 client privilege and work-product protection at once as a shield and sword. See United
28 States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991); see also Chevron Corp. v.

1 Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992). Thus, from the excerpts presented,
2 Judge Skomal had ample evidence to find that fairness required that the redacted
3 sections be considered together with the portions of the reports already produced.

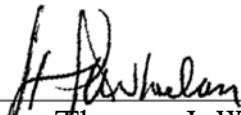
4 Accordingly, Judge Skomal's March 24, 2011 discovery order is neither clearly
5 erroneous nor contrary to law.

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7 **IV. CONCLUSION AND ORDER**

8 In light of the foregoing, the Court **OVERRULES** Defendants' objection to Judge
9 Skomal's March 24, 2011 discovery order. (Docs. 94, 96.)

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11 **IT IS SO ORDERED.**

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13 DATED: May 23, 2011

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17 Hon. Thomas J. Whelan
18 United States District Judge
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